

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,)	No. P1300CR20081339
)	
Plaintiff,)	Div. 6
)	
vs.)	DEFENDANT'S OBJECTION TO
)	STATE'S MOTION FOR
STEVEN CARROLL DEMOCKER,)	WITNESS TO TESTIFY VIA
)	VIDEO LINK
Defendant.)	
)	
)	
)	

Steven DeMocker, by and through counsel, hereby responds to the State's Motion for Witness to Testify Via Video Link and requests that the Court deny the State's Motion. This response is based on the Due Process Clause, the Confrontation Clause, the Fifth, Sixth, Eighth and Fourteenth Amendments and Arizona counterparts, Arizona Rules of Evidence, Arizona Rules of Criminal Procedure and the following Memorandum of Points and Authorities.

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3 **Memorandum of Points and Authorities**

4 The Confrontation Clause of the Sixth Amendment to the United States
5 Constitution provides that in all criminal prosecutions an accused has the right to be
6 "confronted with the witnesses against him." The United States Supreme Court has
7 interpreted the clause to "guarantee[] the defendant a face-to-face meeting with
8 witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016, 108
9 S.Ct. 2798, 101 L.Ed.2d 857 (1988). Face-to-face, in-court testimony serves several
10 purposes: (1) it "ensures the reliability of the evidence by allowing the trier of fact to
11 observe the demeanor, nervousness, expressions, and other body language of the
12 witness"; (2) it "impresses upon the witness the seriousness of the matter and ensures
13 that statements are given under oath"; and (3) it "helps assure the identity of the witness,
14 that the witness is not being coached or influenced during testimony, and that the
15 witness is not improperly referring to documents." *United States v. Hamilton*, 107 F.3d
16 499, 503 (7th Cir.1997).

17 The Supreme Court has explained, "a defendant's right to confront accusatory
18 witnesses may be satisfied absent a physical, face-to-face confrontation at trial only
19 where denial of such confrontation is necessary to further an important public policy
20 and only where the reliability of the testimony is otherwise assured." *Maryland v.*
21 *Craig*, 497 U.S. 836, 850, 110 S.Ct. 3157, 3166, 111 L.Ed.2d 666 (1990). The Eleventh
22 Circuit, in applying this test has acknowledged that "[t]he simple truth is that
23 confrontation through a video monitor is not the same as physical face-to-face
24 confrontation." *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006). See also *United*
25 *States v. Bordeaux*, 400 F.3d 548, 554-55 (8th Cir.2005). The Sixth Amendment's
26 guarantee of the right to confront one's accuser is most certainly compromised when the
27 confrontation occurs through an electronic medium. In *Yates*, the Court reversed a
28 conviction where a critical witness who refused to travel from Australia was permitted

1 to testify by live video feed. “[T]he prosecutor's need for the video conference
2 testimony to make a case and to expeditiously resolve it are not the type of public
3 policies that are important enough to outweigh the Defendants' rights to confront their
4 accusers face-to-face.” *Yates*, 438 F.3d at 1316. The Court focused on the
5 commonality of circumstances in criminal cases and the availability of a Rule 15
6 deposition.¹ The *Yates* court elaborated,

7
8 The district court made no case-specific findings of fact that would
9 support a conclusion that this case is different from any other criminal
10 prosecution in which the Government would find it convenient to present
11 testimony by two-way video conference. All criminal prosecutions
12 include at least some evidence crucial to the Government's case, and there
13 is no doubt that many criminal cases could be more expeditiously resolved
14 were it unnecessary for witnesses to appear at trial. If we were to approve
15 introduction of testimony in this manner, on this record, every prosecutor
16 wishing to present testimony from a witness overseas would argue that
17 providing crucial prosecution evidence and resolving the case
18 expeditiously are important public policies that support the admission of
19 testimony by two-way video conference. *See, e.g., Remote Testimony-A*
20 *Prosecutor's Perspective*, 35 U. Mich. J.L. Reform 719 (2002).

21 *Craig* requires that furtherance of the important public policy make it *necessary*
22 to deny the defendant his right to a physical face-to-face confrontation. 497 U.S. at 852,
23 110 S.Ct. at 3167.

24 Mr. Ray was late disclosed as an expert on cell phone towers, with less than three
25 months before the start of trial on February 18. No report, CV or other information
26 about his testimony was disclosed at that time. During Mr. Ray's interview the State
27 indicated that he intended to present the jury with a PowerPoint created by Mr. Ray
28 (which was likewise late disclosed). Now, in the middle of trial, the State proposed to
introduce complicated expert testimony regarding cell towers by remote video

¹ The defense acknowledges that given the circumstances, the equivalent of a Rule 15 deposition is not possible in this case.

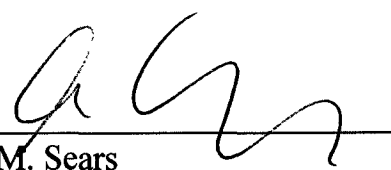
1 conference with Afghanistan. The State acknowledges that it knows of no way to use
2 the PowerPoint given the proposed method of testimony. Furthermore, given the
3 tortured history of the State's provision of laptops to facilitate communication between
4 defense counsel and Mr. DeMocker, within Arizona, which took several hours of
5 computer expert and attorney time, and multiple attempts, the feasibility of presenting
6 testimony in this way is highly questionable. An additional issue is the weight and
7 emphasis the jury may place on the testimony given that it is presented in such an
8 unusual fashion.

9 In this case, there simply is no necessity of the type *Craig* contemplates. There
10 is likewise no particular guarantee of trustworthiness as is required. This is particularly
11 true where the testimony relates to expert, as opposed to factual, testimony.

12 The defense certainly appreciates that Mr. Ray is fighting for his country
13 overseas and observes that his service is, of course, much appreciated and admired.
14 However the State has failed to meet the burden required under *Craig* to subjugate Mr.
15 DeMocker's right to confront the evidence against him.

16 DATED this 14th day of October, 2010.

17
18 By:


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1 **ORIGINAL** of the foregoing hand delivered for
2 filing this 14th day of October, 2010, with:

3 Jeanne Hicks
4 Clerk of the Court
5 Yavapai County Superior Court
6 120 S. Cortez
7 Prescott, AZ 86303

8 **COPIES** of the foregoing hand delivered this
9 this 14th day of October, 2010, to:

10 The Hon. Warren R. Darrow
11 Judge Pro Tem B
12 120 S. Cortez
13 Prescott, AZ 86303

14 Joseph C. Butner, Esq.
15 Jeffrey Paupore, Esq.
16 Prescott Courthouse basket

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